No. 82-1474

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS and HAROLD J. WOLFINGER,
Petitioners,

vs.

EDWARD RONWIN,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The National Conference of Bar Examiners moves for leave to file the attached Brief of Amicus Curiae in support of the petition for certiorari. Petitioners have consented to the filing of this amicus brief; respondent Ronwin has refused to consent.

The National Conference of Bar Examiners is a national service organization for bar examiners like the petitioners in this case. The National Conference of Bar Examiners has an organizational interest in this case because the holding below will have serious impact on the bar examining process and will create potential liability for the National Conference as the organization which prepares and scores the Multistate Bar Examination and the Multistate Professional Responsibility Examination.

With the court of appeals' permission, the National Conference of Bar Examiners filed amicus curiae briefs in support of each of petitioners' two petitions for rehearing in the Ninth Circuit.

In the attached amicus brief, the National Conference of Bar Examiners shows the nationwide importance of the questions for review raised in the petition for certiorari. The opinion below heralds a new era of federal antitrust review of state bar admissions decisions. As the attached amicus brief demonstrates, such review will have a deleterious effect on the bar examining process. It will also cause an unwarranted and undesirable shift from the state courts to the federal courts of responsibility for determining who shall practice law in each of the 50 states.

The attached amicus brief also demonstrates that the questions raised by the petition for certiorari have importance far beyond the bar examination context. Whether the two-pronged test restated in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) applies to state agencies such as the Arizona Supreme Court's Committee on Examinations and Admissions; if so, whether such agencies may be granted discretion without voiding their state action immunity from antitrust liability; and whether such agencies must be "actively supervised" by "the state" are fundamental issues affecting the antitrust liability of all state agencies, not just boards of bar examiners.

Similarly, the application of the *Noerr-Pennington* doctrine to acts of official advisory boards, such as the Committee on Examinations and Admissions, affects a broad range of state bodies counseling states on a myriad of concerns beyond the grading of bar examinations.

For all of these reasons, the National Conference of Bar Examiners respectfully requests that its motion for leave to file the attached brief of amicus curiae be granted.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE NATIONAL CONFERENCE OF BAR EXAMINERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Amicus curiae, the National Conference of Bar Examiners ("NCBE"), respectfully submits this brief in support of the petition by Charles R. Hoover, et al., for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

After the petition for certiorari was filed, this Court decided *District of Columbia Court of Appeals v. Feldman*, No. 81-1335 (March 23, 1983), which requires summary vacation and remand. See pp. 10-11 below.

If this Court does not summarily vacate and remand, it should still grant the petition for certiorari. The court of appeals' decision and the questions raised by the petition

for certiorari have nationwide importance for the future application of the federal antitrust laws to all state agencies, and to state bar examiners in particular.

Under the court of appeals' holding, any disappointed bar applicant may obtain review by a federal court of his failing grade on a state bar examination by filing a complaint alleging a conspiracy by the state bar examiners to restrain competition. The holding below applies to all state bar examiners nationwide because the Arizona bar examination is typical of state bar examinations, and the challenged grading procedure is widely used.

The court of appeals' decision to allow federal court review of state bar admissions practices by antitrust actions will have important, adverse consequences. It will deter eminent practitioners from serving as bar examiners and thus lower the quality of the bar examination process. It will substantially increase the federal courts' litigation burden, shifting the final vote on admission to state practice from the states' supreme courts to federal juries.

Beyond the bar examination context, the petition raises fundamental questions concerning the scope of state action immunity from the antitrust laws. Should different tests of state action immunity apply to different state agencies? How much discretion may state agencies be allowed without losing their state action immunity? Must states "actively supervise" their own agencies to preserve their antitrust immunity? This Court has not yet addressed these questions specifically. The resolution of these questions will affect the relationship between the state and federal governments across the entire range of state functions.

The petition also raises the issue whether the *Noerr-Pennington* doctrine protects the activities of state advisory boards. This issue, too, affects state action, and action by parties dealing with the state, in all areas, not just in the grading of bar examinations.

INTEREST OF AMICUS CURIAE

Organized in 1931, the NCBE is a private, nonprofit corporation affiliated with the American Bar Association. The NCBE's membership includes officers and members of boards of bar examiners and of bar character committees of all 50 states, the District of Columbia, Guam, the Virgin Islands and Puerto Rico. The NCBE's membership also includes judges of state courts which control admission of lawyers to practice.

Among the NCBE's objectives are improving the quality of bar examinations, conducting studies and distributing information about bar examinations, and encouraging the maintenance of high standards by state boards of bar examiners. The NCBE also cooperates with other organizations representing the bench, bar and law schools in solving problems relating to legal education and bar admissions.

In cooperation with the American Bar Association and the American Association of Law Schools, the NCBE has promulgated a Code of Recommended Standards for Bar Examiners. The Code's 29 standards cover all aspects of bar examination, from who should serve as a bar examiner to how bar examinations should be graded.

The NCBE has published *The Bar Examiners' Handbook* (S. Duhl, 2d ed. 1980) which provides extended commentary on each of the 29 Recommended Standards for Bar Examiners. The NCBE also publishes a monthly periodical, *The Bar Examiner,* featuring articles by eminent authorities on admission standards and bar examination procedures, and a *Litigation Report,* detailing the progress of and analyzing the issues in litigation against bar examiners. The NCBE holds conventions, seminars and other instructional sessions for bar examiners and judges.

The NCBE maintains a library of more than 6,500 bar examination essay questions. On request, the NCBE sends

questions and model answers to bar examiners throughout the nation for use in preparing bar examinations.

Since 1971, the NCBE has compiled, administered and scored the Multistate Bar Examination ("MBE"). The MBE is a multiple choice examination containing 200 questions covering contracts, torts, constitutional law, criminal law, evidence and real property. At present, 46 states, the District of Columbia and the Virgin Islands use the MBE as part of their bar examination.

The NCBE has recently established the Multistate Professional Responsibility Examination ("MPRE"). First given in 1980, the MPRE is now used in 27 jurisdictions. The MPRE is a 50-question multiple choice test on legal ethics.

The NCBE has an organizational interest in this case because the court of appeals' decision will interfere with the NCBE's goals of improving the quality of bar examinations and of encouraging the maintenance of high professional standards among bar examiners. NCBE also has an interest in the application of the antitrust laws to bar examiners, both on behalf of its bar examiner members and in its own right as the organization which prepares and scores the MBE and MPRE.

ARGUMENT

1. Application of the Antitrust Laws to Bar Examiners Is of Nationwide Importance

The court of appeals' decision requires the district court to review, in a federal antitrust suit, petitioners' grading of the February 1974 Arizona bar examination. The holding is not limited to Arizona or to the particular test respondent Ronwin took. To the contrary, it threatens the bar examination process in every American jurisdiction.

As in Arizona, the highest court in every state holds the ultimate power to grant or deny admission to the bar.

F. Klein, S. Leleiko and J. Mavity, Bar Admission Rules and Student Practice Rules, 29 (1978) (hereafter "Bar Admission Rules"). In every state, the highest court has delegated the time-consuming, technical task of administering and grading the bar examination to a board or committee of bar examiners composed of eminent legal practitioners, most of whom volunteer their valuable time and skills. *Id.*, chart IV, pp. 30-33. As in Arizona, the state's highest court appoints its bar examiners in each of 40 states. *Id.*, 37.

Arizona's bar examination, too, is similar to almost every other state's. It includes essay questions, prepared and graded by Arizona's bar examiners, and the MBE, prepared and scored by the NCBE. Like most other states, Arizona has an elaborate review procedure to protect against improper or erroneous grading. *Id.*, chart V, pp. 34-36; *The Bar Examiners' Handbook, supra,* 303-309.

Even the particular grading procedure respondent Ronwin attacked is one widely used to assure that bar applicants are graded according to their ability, not according to the difficulty of the particular examination they take. Properly called "scaled scoring," the procedure statistically adjusts for the varying difficulty of different bar examinations.[1] Scaled scores are used in the MBE and MPRE as

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[1]"In a series of tests, such as the MBE, which are intended to measure levels of competence, it is important to have a standardized score which represents the same level of competence from test to test. The raw score is not dependable for this purpose since the level of difficulty varies from test to test. It is not possible to draft two tests of exactly the same level of difficulty. Scaled scores are obtained by reusing some questions from earlier tests which have been standardized. A statistical analysis of the scores on the reused questions determines how many points are to be added to or subtracted from the raw score to provide an applicant's scaled score. Thus a particular scaled score represents the same level of competence from examination to examination." *The Bar Examiners' Handbook, supra,* 61-62.

well as the essay portions of many states' bar examinations. *The Bar Examinations' Handbook, supra,* 69-72, 271-282.

Because the February 1974 Arizona bar examination and its grading differed in no substantial respect from the tests given and the grading procedures employed in every other American jurisdiction, the court of appeals' decision will affect the bar admissions process in every state.

The impact of the court of appeals' opinion on the bar admissions process will be far-reaching and unremittingly adverse. "The bar examination seems to be a favorite whipping boy of critics of the system." Bar Admission Rules, 39. Partly as a result, "[o]ver the past 10 years, there has been a proliferation of suits by unsuccessful bar applicants attacking bar examinations on constitutional [and other] grounds." *The Bar Examiners' Handbook,* 26; see cases cited in *id.,* 26-55; Bar Admission Rules, 53-144.

As the petition (pp. 6-7) points out, this rising tide of litigation has been kept in check until now by an interrelated set of judicial rules, the effect of which has been to confine federal review of individual denials of admission to review by this Court on petitions for certiorari and to judge broadscale constitutional attacks on bar examinations by relatively relaxed tests.

Only last week, this Court held that the lower federal courts lack jurisdiction to review, under any legal theory, the order of a state supreme court relating to admission of members of its bar. *District of Columbia Court of Appeals v. Feldman, supra,* slip op. at 20-24. Review of such individual bar admissions decisions may be had only in this Court. *Id.,* slip op. at 24. Since Ronwin's complaint sought antitrust review of and damages based on his individual denial of admission, the *Feldman* decision squarely governs this case. The judgment below should be

summarily vacated and remanded for reconsideration in light of *Feldman*. See order in *H.S. Crocker Co. v. Ostrofe*, 51 U.S.L.W. 3633 (U.S., Feb. 28, 1983).

Moreover, the court of appeals' decision will permit disappointed bar applicants to easily avoid *Feldman's* strictures. Instead of a review limited to constitutional standards, the court of appeals' opinion allows review under the more stringent rules of the antitrust laws which are intended to serve different purposes. Rather than confining review of individual denials of admission to this Court, *see id.*, slip op. at 20, 23-24, the court of appeals would allow juries in every federal district court to second-guess state bar examiners.

Antitrust review of bar admissions decisions would be extremely burdensome to bar examiners even if they ultimately prevailed. Antitrust claims are easily alleged,[3] but difficult to resolve before trial. *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962). Antitrust litigation is expensive to defend, normally involving copious discovery and lengthy trials. E. Timberlake, Federal Treble Damage Antitrust Actions, § 1.03, p. 2 (1965).

Typically, bar examiners are eminent practitioners "with scholarly attainments and an affirmative interest in legal education," who serve with no or minimal compensation. *The Bar Examiners' Handbook*, pp. 95-97, 99. The court of appeals' decision will discourage such lawyers from serving as bar examiners because of the expense of defending antitrust actions, the threat of liability for treble damages and attorneys fees, and the necessity of spending many hours in depositions, answering interrogatories and preparing defenses.

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[3]See Areeda, Antitrust Immunity for "State Action" After *Lafayette*, 95 Harv.L.Rev. 435, 451-453 (1981); II P. Areeda & D. Turner, *Antitrust Law*, ¶ 317, pp. 71-84 (1978).

Antitrust review of bar admissions would entail a dramatic and undesirable shift in the relationship between state and federal courts. As respondent Ronwin's litigation history shows, see petition, 3-4 and n. 3; see also *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981), disappointed bar applicants have the inclination, incentive and ability to pursue indefatigably every available means to secure review of their exclusion from practice.

In 1981, 59,307 applicants took bar examinations in American jurisdictions; 65.9 percent or 39,088 passed. Smith, 1981 Bar Examination Statistics, 51 Bar Examiner 27 (1982). If only five percent of the disappointed bar applicants filed antitrust suits, the federal courts could expect 2000 new antitrust actions each year.

Such an influx of litigation would further clog already overburdened federal dockets. More importantly, it would shift control over admissions from each state's highest court to federal judges and juries.[3]

Federal court review of failed bar examinations would severely impair the state's "compelling interest" in regulating the practice of law. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 361-362 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). It would also offend settled principles of federalism. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400, 415-416 (1978); *National League of Cities v. Usery*, 426 U.S. 833, 842-845, 851-852, 855 (1976); *Younger v. Harris*, 401 U.S. 37, 43-49 (1971). States may not interfere with the federal government's regulation of admission to its bar. *Sperry v.*

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[3]Even if bar examiners always prevailed in such cases, federal review would have an undesirable, chilling effect on state bar examiners' performance of their duties and would entail an equally undesirable post hoc probing of their minds and the reasons for their official decisions. See P. Areeda, *Antitrust Law*, ¶ 203.3d, pp. 18-20 (Supp. 1982).

State of Florida, 373 U.S. 379 (1963). Federal interference with the states' regulation of admission to their bars would equally impair our dual system of government. *See Parker v. Brown*, 317 U.S. 341, 351 (1943).

Nor would antitrust review of state bar admissions practices advance any congressional objective. Admission to state bars is not and will not be determined by the free interplay of economic forces.[4] Every state has by now replaced "unfettered business freedom," *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), with regulation in this area in order to protect the public against incompetent would-be attorneys. See Bar Admission Rules, chart V, pp. 34-36. Scrutinizing bar examination grading practices under the antitrust laws will not advance the Sherman Act's objectives, but it will seriously harm the bar examination process and its public protection role.

2. The Petition Presents Important Questions Regarding the Scope of State Action Immunity from the Antitrust Laws

Resolution of the questions raised by the petition for certiorari is important for state supreme courts and for bar examiners across the country, as demonstrated above.

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[4]In an excess of Jacksonian democratic fervor, the 1851 Indiana Constitution proclaimed that every voter of good moral character was entitled to practice law in all courts. This experiment did not last long. *The Bar Examiners' Handbook*, 15. Since then no state has left the practice of law to unregulated competition. Indeed, the long-term trend has been toward stricter regulation and more careful screening of would-be lawyers, not toward greater economic freedom. Karger, The Role of the NCBE in the Bar Admissions Process: Its First Fifty Years, 50 Bar Examiner 7, 8-9 (1981); *see also*, Griswold, In Praise of Bar Examinations, 60 A.B.A. J. 81 (1974); Sprecher, Fifty Years of Service, 50 Bar Examiner 4, 5 (1981).

In addition, the petition raises three interrelated issues regarding state action immunity from the antitrust laws which are of grave concern to all state officials, whatever their particular functions. Those issues may be rephrased simply as "Who is the State," "How detailed must state authorization be," and "Must the state 'actively supervise' its own agencies" for purposes of state action immunity?[5]

As Professor Areeda has explained:

> Other questions remain open after [*City of*] *Lafayette* [*v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978)]. The Court did not clearly define which governmental bodies are "the state" and which require "authorization." Nor did it establish the clarity with which "the state" must both authorize an allegedly anticompetitive decision and display its intention to displace the antitrust laws. The answers to these several open questions are interdependent.

Areeda, *supra*, n. 2, 95 Harv.L.Rev. at 441-442.

a. The Arizona Supreme Court's Committee on Examinations and Admissions Is "the State"

City of Lafayette v. Louisiana Power & Light Co., supra, and *Community Communications Co. v. City of Boulder*,

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[5]These questions are necessarily raised by the petition even if respondent Ronwin were correct in asserting, dehors the record, that the Arizona Supreme Court commanded the Committee on Examinations and Admissions to use a grading formula different from the one the committee actually employed. "Wise and efficient federalism argues against review by antitrust courts of ordinary state agency errors. . . . 'Ordinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control." Areeda, *supra* n. 2, 95 Harv.L.Rev. at 453. As noted, Arizona has a procedure for review of the committee's actions. The procedure, which Ronwin unsuccessfully invoked, see 686 F.2d at 694, is fully adequate to correct the type of error in grading formula which Ronwin alleges.

455 U.S. 40 (1982) hold that municipalities are not "the State" and thus must meet the two-part test restated in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) if they are to secure state action immunity from the antitrust laws. This result follows because the "state action exemption [is] based upon the federalism principle of limited state sovereignty . . . [and] municipalities 'are not themselves sovereign . . . .'" *Community Communications Co. v. City of Boulder, supra*, 455 U.S. at ....., 102 S.Ct. 835, 842.

The same federalism principle dictates that when "the state" acts in its sovereign capacity, it is immune from antitrust liability. *Id.*, at 840, 841; *Bates v. State Bar of Arizona, supra*, 433 U.S. at 360; *Parker v. Brown, supra*, 317 U.S. at 350-351. But what organs of state government are "the state" for this purpose?

This Court's prior decisions do not answer that question. A state's legislature, governor and supreme court presumably are "the state" and are immune without meeting the *Midcal* test.[6] This Court has never ruled whether some or all subordinate state agencies or officials with state-wide jurisdiction are likewise immune without meeting the *Midcal* test. This Court's decisions give no guidance in deciding at what level, if any, state agencies are no longer "the state" acting in its sovereign capacity.

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[6] As Professor Areeda has written:

> If the Court does decide to examine the acts of state organs under *Lafayette*, some exclusions are inescapable. The legislature itself (including, of course, the governor as part of the enactment process) is "the state." Similarly, the state's highest court is, in its realm, "the state" and requires no further authorization. In *Bates* [*v. State Bar of Arizona*, 433 U.S. 350, 360 (1977)], the Supreme Court found [state action] immunity for lawyers' advertising rules promulgated by Arizona's highest court: "That court is the ultimate body wielding the State's power over the practice of law . . . ."

Fns. omitted; Areeda, *supra*, 95 Harv.L.Rev. at 444.

In this case, the court of appeals ruled that the *Midcal* test must be applied whatever the status of the state body. 686 F.2d at 697. That view is plainly wrong, as this Court's decisions in *Community Communications*, *Bates* and *Parker* show.[7]

This case involves a state entity but one step below the state's highest judicial authority. The Arizona Supreme Court appoints the members of its Committee on Examinations and Admissions. Ariz.Sup.Ct.R. 28(a). The Arizona Supreme Court's rules direct the committee to examine bar applicants and to recommend qualified applicants to the court for admission. *Ibid.* The committee is even required to report to the court on its formula for grading the bar examination. Ariz.Sup.Ct.R. 28(c)(VII)(B).

The Committee on Examinations and Admissions is as closely affiliated with and supervised by the Arizona Supreme Court as it is possible to be. The committee performs functions which the supreme court would otherwise have to perform itself, thereby reducing the time it has to de-

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[7] *See also, State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 369-370 (9th Cir. 1974):

> The "legislative mandate" test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is no doubt that the defendant is the state, the "legislative mandate" analysis is unnecessary.

Accord: E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52, 55-56 (1st Cir. 1966) and cases cited in the petition at pp. 12-13.

In *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 553 F.Supp. 976, 989-981, 985, 988-989 (D.Hawaii 1983), Judge Pence has perceptively demonstrated the impropriety and futility of applying the *Midcal* test to instrumentalities of the state: "Where private parties are attempting to monopolize an area of trade, the public has every right to expect protection; with governmental bodies, the people have more direct recourse—the vote." *Id.* at 980-981.

cide cases. The Arizona Committee on Examinations and Admissions is "the state" and should not be required to pass the *Midcal* test to secure antitrust immunity.

The Court should grant certiorari to decide which subordinate state agencies with statewide jurisdiction are "the state" for antitrust purposes. The states need to know how far their antitrust immunity extends. See cases cited in Areeda, *supra* n. 2, 95 Harv.L.Rev. at pp. 445-452.

b. The State May Delegate Authority to Its Administrative Agencies Without Subjecting Them to Antitrust Scrutiny

Assuming *arguendo* that the Committee on Examinations and Admissions is not "the state," this case presents a second question of equal importance in the application of the *Midcal* test: How detailed must "the state's" directive to its own subordinate agency be in order to meet the "clearly articulated and affirmatively expressed as state policy" prong of that test?

Here, the court of appeals held that the Arizona Supreme Court's delegation to the committee of "general authority to examine applicants to determine if they are qualified to practice law and [the supreme court's review of] the Committee's recommendations regarding admission does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws." 686 F.2d at 696. The court of appeals appears to have held that a supreme court rule "directly requiring the challenged grading procedure" is necessary to meet *Midcal's* first prong. *Ibid.*

This holding, too, is plainly wrong. "Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature" or the supreme court. Areeda, *supra* n.2, 95 Harv.L.Rev. at 445

n. 49. State government could not function if the state legislature, governor or supreme court had to promulgate a law, executive order or rule "directly requiring" each decision, practice or procedure adopted by each of the thousands of boards, commissions and agencies through which each state carries on its business.

In a very recent case involving municipalities, entities less directly a part of state government, the Seventh Circuit held, in direct conflict with the decision below:

> First, the Towns contend that the conduct which must be pursuant to state policy is the City's use of monopoly power in sewage treatment services to monopolize sewage collection and transportation . . . .
>
> We reject the Towns' argument that the authorization of the anticompetitive conduct complained of must be as specific as they request. In *City of Lafayette*, the Court rejected the position "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit," and the Court went on to state that an adequate state mandate exists when it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of". [Citation.] In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization . . . .

Fn. omitted; *Town of Hallie v. City of Eau Claire*, No. 82-1715, slip op. at 7-8 (7th Cir. Feb. 17, 1983).

To properly conduct their affairs, states must know how much discretion they can allow their subordinate agencies

without rendering those agencies' acts subject to federal review in antitrust actions. The Court should take this opportunity to settle the conflict between the Seventh and Ninth Circuits and elucidate this aspect of the *Midcal* test.

c. A State Need Not "Actively Supervise" Its Own Agencies

Assuming the *Midcal* test applies to subordinate state agencies like the Arizona Supreme Court's Committee on Examinations and Admissions, the petition presents a third important question regarding state action immunity: Must the state "actively supervise" its subordinate agencies to shield their acts from antitrust review?

In the decision below, the Ninth Circuit concluded that the committee was not immune from the antitrust laws unless it grading practices were actively supervised by the Arizona Supreme Court. 686 F.2d at 696-697. In a very recent opinion, the Seventh Circuit has adopted a diametrically opposed view, holding that "a state is not held to the high standard of active supervision of the conduct of a city [or, *a fortiori*, a state agency such as the committee] performing a traditional municipal [or state] function for that [entity] to receive *Parker v. Brown* immunity. The only requirement for receiving immunity when a traditionally municipal function is involved is that the challenged restraint must be in furtherance or implementation of a clearly articulated and affirmatively expressed state policy." *Town of Hallie v. City of Eau Claire, supra*, slip op. at 16; *see also Deak-Perera Hawaii, Inc. v. Department of Transportation, supra*, 553 F.Supp. at 988-989.

This Court should grant certiorari to resolve the conflict between the circuits on this important question.

3. The Noerr-Pennington Doctrine Immunizes State Advisory Boards

The petition for certiorari also raises an important question concerning the application of the so-called *Noerr-Pennington* doctrine to state advisory boards.

Under this Court's cases, "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *see also, Eastern R.R. President Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Where, as here, no "sham" activity has been alleged, *see California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511-513 (1972), the actions of a purely advisory state body should be absolutely shielded from antitrust scrutiny by this doctrine.[8]

A determination of this question is of considerable nationwide importance. There are untold numbers of advisory boards at every level of American government. In 1972, Congress concluded that there were between 2,600 and 3,200 advisory committees in the federal government alone. H.R. Rep. No. 1017, 94th Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Ad. News 3491, 3492.

Typically, such advisory boards include members of affected industries because they are knowledgeable about the matters on which the government seeks advice, they have an interest in participating, and their participation

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[8]As the petition (pp. 19-20) demonstrates, the Arizona Committee on Examinations and Admissions is purely advisory. Arizona Supreme Court Rule 28(a) limits the committee's function to examining applicants and recommending to the supreme court for admission those applicants the committee finds qualified. The same rule provides that the supreme court will consider the committee's recommendations and then decide for itself whether to grant or deny admission.

assures that the government will hear a full range of views. See *id.* at 3495-3496. Because of this involvement by affected industries, it is easy for a displeased competitor to allege an anti-competitive conspiracy among advisory board members, as Ronwin did in this case.

But review of an advisory board's work under the antitrust laws, or worse, imposition of liability on board members for acts taken by public officials following board recommendations, would severely restrict all levels of government in using this helpful means of acquiring expert assistance and community involvement in the solution of important social problems.

This Court should grant the petition for certiorari to hold that antitrust liability cannot be imposed on members of a state advisory board for performing their advisory function, absent allegation and proof of "sham" activity.

CONCLUSION

For the reasons stated above, the petition for certiorari raises important questions concerning the application of the federal antitrust laws to bar examiners in all states. The answers to the "state action" and "*Noerr-Pennington*" questions the petition presents will affect the fundamental allocation of power and responsibility between the state and federal governments.

This petition for certiorari presents an important opportunity for this Court to remove the threat of federal antitrust review of state administrative determinations.

The petition for certiorari should be granted, and the decision of the United States Court of Appeals for the Ninth Circuit should be reversed. Alternatively, the judgment should be summarily vacated and remanded for reconsideration in light of *District of Columbia Court of Appeals v. Feldman, supra.*

Dated: March 30, 1983

Respectfully submitted,

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